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No. 93-1256

In The

Supreme Court of the United States

October Term, 1993

J. WILLIAM HAYDEN,

Petitioner,

vs.

LA-Z-BOY CHAIR CO.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

The respondent's brief in opposition confirms the reasons that the Court should hear this case. We say this because of four separate reasons. First, respondent simply ignores the significance of the definition of "employ" that has been adopted in the Fair Labor Standards Act (29 U.S.C. § 201 et seq.) The act defines that term to include "suffer[ing] or permit[ing] to work." (29 U.S.C. § 203 (g)). The Court not long ago recognized that this definition "stretches the meaning of "employee" to cover some parties who might not qualify as such under a strict application of traditional agency law principles." (*Nationwide*

Mutual Insurance Co. v. Darden, 112 S.Ct. 1344, 1350 117 L.Ed.2d 581 (1992)).

We pointed in our initial argument (p. 6) that the Age Discrimination in Employment Act ("ADEA") (29 U.S.C. § 621 et seq.) under which this case was brought is an amendment to the FLSA (29 U.S.C. § 626 (b)) and remedies for ADEA were specifically adopted from FLSA (ibid.) Accordingly, the "textual asymmetry" which the Court found precluded application of this definition to an ERISA case in *Darden*, supra, 112 S.Ct. at 1350 is not present here. Respondent did not address this statutory definition in their opposition arguments. Neither have the earlier ADEA decisions which we discussed in our arguments (pp. 4-5) and respondent discussed in theirs (pp. 5-7).

As we stated in our initial argument (p. 6), "[s]omeone – [petitioner's] customers, his supplier (respondent) or his corporation – was suffering or permitting him to work. Therefore, he was employed by them." Then, through an act solely undertaken by respondent, he was no longer employed. The ADEA is a concededly important statute and to allow this transparent anomaly in its interpretation is to us troublesome, particularly in light of the nearly quarter of a century that petitioner has devoted to their services.

Secondly, respondent misconstrues, as did the court of appeals, the proper standard for finding that an issue has been preserved in the lower courts. This question arises with respect to one of petitioner's arguments – that respondent had indirectly interfered with petitioner's relationships with his customers by terminating him. A

party "opposing a summary judgment motion must inform the trial judge of the reasons legal or factual, why summary judgment should not be entered." (*Liberles v. County of Cook*, 709 F.2d 1122, 1126 (7th Cir. 1983).) Petitioner did this by informing the court of a certain line of cases. (Pet., A-10). This line of authority was consistent with petitioner's complaint which alleged that he "had developed ongoing relationships with customers in his sales territory" and found himself in the position of being completely controlled in his access to them and the employment opportunities which they represented" by respondent. (Pet., p. 3). (*Baker v. McNeil Island Corrections Center*, 859 F.2d 124 (9th Cir. 1988) (Defendant corrections department indirectly interfered with plaintiff's being hired by state librarian.))

Thirdly, respondent's arguments, which the court of appeals accepted, that his employment relationships have not been interfered with because he can still sell other companies products (Resp., p. 12) is simply not the law. (*Gomez v. Alexian Brothers of San Jose*, 698 F.2d 1019, 1021 (9th Cir. 1983) and *Mitchell v. Tenney*, 650 F.Supp. 703 (N.D.Ill. 1986) (The distinguishing features cited by respondent between this case and *Mitchell* (Resp., ftn. 10) do not even facially relate to the question of whether the availability of one set of employment opportunities totally insulates an action for the discriminatory loss of another one.))

Fourthly, respondent does not even address the petitioner's point (Pet. p. 11) that, when Congress has wanted to exclude independent contractors from a statute, such

as the National Labor Relations Act, it has done so explicitly. (29 U.S.C. § 152 (3)). Rather, than advance the argument any on this point, respondent makes statements such as respondent "unequivocally conceded his independent contractor status below" (Resp., p. 2) begging the question of whether or not a conceded status should always be sufficient to insulate one from legal scrutiny for their acts.

CONCLUSION

For these reasons and those set forth in the original petition, we request that the petition be granted.

Respectfully submitted,

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